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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCHE LAMONT HARRISON, Defendant and Appellant.	A132658 (Alameda County Super. Ct. No. H46973)

A jury convicted defendant Marche Lamont Harrison of residential burglary (Pen. Code, § 459),[1] residential robbery (§§ 211, 212.5), forcible rape while acting in concert (§ 261.4), forcible oral copulation while acting in concert (§ 288a, subd. (d)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The court found defendant has one prior conviction for selling drugs (Health & Saf. Code, § 11352, subd. (a)) and two prior convictions for robbery (§ 211). The court sentenced defendant to 107 years to life in prison.

Defendant contends that an extended lapse of time between the filing of the complaint and his arrest violated his rights to due process and a speedy trial; that the trial court abused its discretion in replacing a deliberating juror with an alternate juror; and that the trial court erred in admitting certain expert testimony. We find no merit in these

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Statement of Facts and parts 1 and 3 of the Discussion.

[1] All further section references are to the Penal Code except as noted.

contentions and shall affirm the judgment. We shall publish only the portion of our opinion addressing the removal of a deliberating juror.

STATEMENT OF FACTS[*]

There was evidence at trial of the following facts. Jane Doe[2] lived in Union City with her husband, Charles, and their two daughters, Angela age 22 and Erica age 16. Charles was a marijuana dealer. On the morning of December 28, 2004, Jane and her daughters were home but Charles was away. Around 10:30 a.m., the doorbell rang and Angela opened the front door to two men with a dolly and large cardboard moving box. One of the men, later identified as defendant, was holding a white binder. He asked Angela if Charles lived there and when she answered affirmatively the men entered the house.

Defendant pointed a gun at Angela and asked "Where's the safe?" Angela said she did not know what he was talking about and defendant asked if anyone else was home. Angela said her mother and sister were home. Defendant and the other man, both armed, forced Angela to take them to the bedroom of her mother, Jane Doe. As defendant held Angela, with a gun pointed at her, the other man grabbed Jane by the arm and "yank[ed]" her from bed. The two men took Jane and Angela to the bedroom where Erica was sleeping and defendant's accomplice pulled the young woman from bed, saying "This ain't no dream."

The men moved the women into the living room and ordered them to strip. The women removed everything but their panties. The men forced Jane to duct tape each daughters' ankles and wrists together, and tape shut their mouths. Defendant told his accomplice to shoot the bound women if his questions were not answered and demanded that Jane tell him where the security system control was located. When shown the system in the hall closet, defendant tore it apart, threw it into the bathtub and ran water over it. Defendant then pulled Jane into the garage where the safe was located and demanded that

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[*] The Statement of Facts is not certified for publication. (See fn., *ante*, p. 1.)

[2] A fictitious name is used to protect the victim's privacy. (§ 293.5.)

she open the safe. After it was opened, defendant ordered Jane back to the living room and returned to the garage where he emptied the safe of a Rolex watch, jewelry and other items.

Defendant then took Jane with him as he went through the house "ransacking everything." In Jane's bedroom, defendant grabbed her buttocks and said "I want a piece of that." Defendant asked if there were condoms in the bedroom and when Jane said there were not, defendant went through the house looking for condoms. Finding none, defendant took a plastic bag from a kitchen cabinet and forced Jane back to the bedroom.

Defendant, still armed, ordered Jane to take off her panties and lie on the bed. Defendant forced open her legs, orally copulated her, then put the plastic bag over his penis and "forced his penis into [her] vagina." He ejaculated into the plastic bag. Defendant then brought Jane to the living room where he told his accomplice that it was "his turn." The accomplice pulled Jane back to the bedroom and forced her to orally copulate him. He then took Jane to the living room, tied her, and the men went through the house looking for drugs and cash. The men took the women's identification cards and cell phones. As they were leaving, defendant told the women he would kill them if they called the police and that he would know if they called because he had an "inside guy" with the police.

As soon as the men left, Jane untied herself but within a minute or two defendant returned alone, retied Jane, and briefly went into the kitchen and down the hallway to the bedroom. Jane testified that "[i]t sounded like he was looking for something in the master bedroom." Defendant then left again. Jane waited a few minutes to be sure he was gone and then untied herself and her daughters.

Defendant's death threats made Jane afraid to immediately call the police. She telephoned her husband, friends came to comfort her, and she began to clean the house. One of the friends convinced her to call the police and she did so several hours after the robbers left. The police arrived and saw that the garage had been "ransacked." They found a plastic bag containing semen in the hall closet. A white binder matching the

description of the binder defendant had when he arrived at the house was found on the kitchen table. An invoice inside the binder bore defendant's fingerprints.

Following the identification of defendant's fingerprints, the police prepared a six-person photo line-up from which Jane positively identified defendant as the man who raped and robbed her. The police obtained a search warrant and searched an Oakland residence where they recovered jewelry and other items taken from Jane's residence, a fully loaded revolver, and a photograph of defendant holding a revolver and mail bearing defendant's name and address.

Shortly afterwards, a criminal complaint against defendant was filed and a warrant was issued for defendant's arrest. However, defendant was not apprehended until December 2008, almost four years after the charges were filed. Following defendant's arrest, a criminalist found that defendant's DNA profile matched the semen contained in the plastic bag recovered from Jane's house. The plastic bag also had material on the exterior surface, which the criminalist determined to be a mixture of Jane's epithelial cells and sperm cells from her husband. The criminalist testified that the surface of an object put inside a female vagina can receive a transfer of preexisting sperm from within the vagina.

DISCUSSION

1. The time lapse between the filing of charges and defendant's arrest did not violate his rights to due process and a speedy trial.*

In the trial court, defendant moved to dismiss the charges on the ground that the nearly four-year delay between the filing of the complaint and his arrest prejudiced his ability to defend against the charges, in violation of his due process and speedy trial rights. Defendant now challenges the denial of the motion.

Delay in prosecution between the filing of a felony complaint and a defendant's arrest may constitute a denial of due process and the right to a speedy trial if the delay is

* Part 1 is not certified for publication. (See fn., *ante*, p. 1.)

unjustified and prejudicial. (*People v. Cowan* (2010) 50 Cal.4th 401, 430.)[3] To prevail on a motion to dismiss on this ground, the defendant must affirmatively " 'demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.' " (*Ibid.*) On appeal, "[w]e review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them." (*Id.* at p. 431.)

In support of his motion, defendant submitted declarations stating that he "was completely unaware of the charges pending against [him] in the present case" before his arrest in December 2008 and had been "living openly in Oakland" and could have been arrested sooner "had the authorities made reasonable efforts to do so." Defendant declared that he had "no recollection" of his whereabouts on the date of the crimes or "who, if anyone, [he] may have been with" on that date. He also stated that a woman named Lynne Nichols, who died in early 2008, had been "personally present with [him] when [he] was in the company of [the] complaining witness Jane Doe" prior to the date of the crimes and therefore could have impeached Jane's statement that "the perpetrators had no prior associations to her or her family."

As justification for the delay, the prosecution offered the testimony of two police officers who said that an arrest warrant was timely issued when the complaint was filed on February 25, 2005, and that efforts to apprehend defendant were unsuccessful until defendant was identified during a traffic stop on December 31, 2008. The investigating officer testified that an earlier search of defendant's Oakland residence in early February 2005 failed to locate him and a search of computer databases failed to provide another

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[3] Due process and a speedy trial are guaranteed by both the state and federal Constitutions. (U.S. Const., 5th & 6th Amends.; Cal. Const., art. I, § 15.) However, state and federal speedy trial rights attach at different stages of a felony proceeding. (*People v. Martinez* (2000) 22 Cal.4th 750, 754-755, 765.) The state speedy trial right attaches upon the filing of a complaint but the federal right attaches only after a preliminary hearing and filing of an information. (*Ibid.*) Only the state speedy trial right is at issue here.

address. Union City police sought the assistance of an Oakland police officer with the "Sexual Assault Felony Enforcement" (SAFE) task force because defendant's contacts and last-known residence were in Oakland.[4] The Union City Police Department prepared a wanted flyer with defendant's photograph and identifying information and distributed it to its officers and to SAFE.

Oakland Police Officer Timothy Bergquist of SAFE testified that he spent several years trying to locate defendant. Bergquist said a "Be on the Lookout" (BOL) flyer with defendant's photograph and identifying information was periodically distributed to the Oakland Police Department and federal and Bay Area public agencies. BOL pocket-sized cards were distributed to field officers. Bergquist testified that he also ran a computer database search "typically once a month" to check for any updated addresses from driver's license information and other sources but failed to locate defendant.

On this evidentiary showing, the trial court did not abuse its discretion in denying the motion to dismiss. The harm alleged by defendant was his failure to recall "who, if anyone, [he] may have been with" on the day of the crimes. A defendant's " 'bare statement' of 'inability to recall' " his whereabouts for presentation of a possible alibi defense " 'cannot be considered more than minimal prejudice' " where, as here, there is strong evidence of defendant's guilt. (*People v. Cowan, supra,* 50 Cal.4th at p. 432.) Defendant's fingerprints and sperm were found at the crime scene, making an alibi defense unlikely to succeed. The only other harm alleged by defendant was the death of a witness who could have testified that the witness was "present with [him] when [he] was in the company of [the] complaining witness Jane Doe" before the date of the crimes. The loss of a *material* witness due to prosecutorial delay can be prejudicial (*id.* at p. 430) but this witness had no material testimony to offer. Defendant argues that the testimony of this witness would have impeached Jane's statement that she did not recognize defendant when he attacked her. The significance of such a discrepancy would have been limited at

[4] SAFE is a task force composed of federal, state and local law enforcement agencies that tracks and monitors sex offenders. Its duties include warrant service.

best. Moreover, testimony that defendant had been "in the company" of Jane, without further explanation, falls far short of demonstrating that defendant and Jane had a personal relationship or that he was sufficiently familiar to her that she necessarily would have recognized him at the time of the crimes.

Balanced against this weak showing of prejudice is the testimony of the efforts that were made to apprehend defendant, which the trial court considered to have been reasonable. The police searched defendant's last known address and did not find him there. They timely issued an arrest warrant and periodically ran computer database searches trying to find another address for defendant. The police also repeatedly issued flyers and cards alerting Bay Area police agencies and other public agencies to be on the lookout for defendant, all without success.

Defendant contends that Officer Bergquist's testimony that periodic computer checks were run from 2005 to 2008 is contradicted by an activity log in the SAFE case file that was produced after the evidentiary hearing. This document contains a May 23, 2006 entry with the notation "case closed. UTL warrants."[5] When defendant brought this document to the court's attention at the conclusion of the trial, the court expressly found that it did not undermine Bergquist's testimony. As the court stated, the officer's testimony is supported by ample documentary evidence that the search for defendant continued beyond 2006, including several tracking flyers disseminated in 2007 that were admitted in evidence. Substantial evidence fully supports the trial court's finding that police efforts to locate defendant continued from the time he was identified as a suspect until his apprehension.[6]

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[5] Defendant filed a motion to augment the record with this document. We deem the motion to be a request for judicial notice and grant the request.

[6] Defendant also contends that the prosecutor was required to produce the SAFE file earlier in the proceedings. (*People v. Brady* (1963) 373 U.S. 83.) Assuming, without deciding, that he is correct in this respect, the file nonetheless was produced in time to be brought to the court's attention in support of defendant's request to dismiss the action. The court considered the significance of the document on the merits (as do we) and justifiably found that it did not alter its conclusion. Hence, it is clear that earlier

Defendant also criticizes the nature of the police efforts to locate him, noting that the police did not interview his relatives and friends, check with utility companies for accounts in his name, or return to defendant's former residences to develop leads. While more undoubtedly could have been done, as is always the case, the relevant question is whether reasonable efforts were made under the circumstances. The trial court concluded, upon substantial evidence, that police efforts were reasonable: "the court can't say that the police [acted] unreasonably or willfully to oppress or neglect their duties" given limited resources "in a city like Oakland where there's plenty of crime and the manpower of the police department isn't at a strength where I'm sure many would prefer it to be." The police did not engage in "purposeful delay to gain an advantage." (*People v. Cowan, supra,* 50 Cal.4th at p. 431.) Even if we accept defendant's assertion of police negligence, there was no constitutional violation, given defendant's weak showing of prejudice from the delayed prosecution. (See *ibid.* [" 'If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' "].) Defendant's motion to dismiss was properly denied.

2. The trial court properly removed a deliberating juror who was unable to follow the law.

The trial court removed a juror during deliberations upon concluding that the juror was unable to follow the law. (§ 1089.) Defendant contends the trial court abused its discretion and violated his state and federal constitutional right to trial by jury by dismissing the juror because the record does not establish to a demonstrable reality that the juror was unable to perform his duties. Although the replacement of a juror during the course of deliberations can be justified only under extreme circumstances, we shall set out in some detail the juror's behavior that demonstrates the patience and care with which

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production of the file would not have affected the disposition of the motion. (Cf. *People v. Clark* (2011) 52 Cal.4th 856, 981-982.) Defendant also asserts that the prosecutor knowingly used false evidence in presenting Bergquist's testimony of ongoing efforts to locate defendant. (*Napue v. Illinois* (1959) 360 U.S. 264.) As discussed above, Bergquist's testimony was corroborated by documentary evidence and was not compromised by the single notation in the SAFE file upon which defendant relies.

the trial court proceeded. The court did not abuse its discretion when ultimately forced to conclude that the juror was unable to follow its instructions.

A. *Jury deliberations and juror removal*

Deliberations began on the afternoon of Tuesday March 15, 2011. About two hours into deliberations the jury sent a note with questions and requests for materials, as follows: "Was there any evidence of DNA swabs from mouth of Jane Doe? [¶] Transcript and audio initial interviews w/ Jane Doe at hospital, 12/28/04; and initial interviews with Angela and Erica Doe, at police station. [¶] White binder from crime scene. [¶] Color photo of revolver, in Oakland residence. [¶] Transcript & audio of photo lineup session. [¶] DNA typing lab results. [¶] List of all prosecution and defense exhibit[]s." The jury then recessed for the day.

The next day, Wednesday March 16, the court conferred with counsel and then called the jury into the courtroom to respond in detail to each item in the note. Its response included an explanation that there was no evidence introduced at trial about DNA testing of oral swabs from Jane Doe and no DNA laboratory results apart from the expert's testimony, which upon request would be read back to the jury. The court also explained that only portions of the audiotape witness interviews and the photo lineup session with Erica had been introduced as evidence and that those recordings could also be re-played in the courtroom upon request.

The jury resumed deliberations for a few minutes, then sent a note requesting all available audio recordings, the "entire" reporter's transcript and a "[t]imeline of case development: dates of actions taken by detectives, crime labs, searches conducted, samples taken, etc." The court arranged to have the recordings played for the jury and explained that the entire reporter's transcript would not be read but that portions would be read if the jury had specific questions. The court also explained that it could not create a timeline but that an individual juror was free to develop one from the juror's notes and recollection of the testimony.

Another note, previously typewritten at home by Juror No. 9, was presented to the court immediately after the morning recess on March 16. The note read: "Access to the computer has become an essential part of daily life. College students use laptops to take notes in class, sort through a multitude of concepts and ideas, do homework, draft papers, and revise papers. The students also have access to printers. [¶] It would be a serious handicap not to have access to the computer. [¶] In sorting through the facts of this case, the jurors may also need the help of a computer, say, merely for word-processing: [¶] - to establish the timeline [¶] - to note which exhibit establishes what fact, or raises what questions [¶] - to track the consistency or inconsistency in the same witness' testimony [¶] - to track the consistency and inconsistency among different witnesses and documents [¶] - to put down, in writing, the ideas that have come to the juror's mind, so that the ideas can be scrutinized (by himself or herself individually at first) more closely and more objectively at a later time [¶] - in light of the whole record, after reviewing all of the evidence [¶] - to track the questions in one's mind [¶] - to figure out which elements of crimes have, or have not, been proven [¶] - to organize, rethink, and revise all of the above in an efficient manner [¶] - Will a computer for word-processing be made available to the jurors? [¶] Will a LaserJet printer be made available to the jury? [¶] Can a juror use his or her own at home, under the condition that no one else will have access to the computer throughout the trial? [¶] Will a juror be permitted to bring his or her own LaserJet printer to the jury deliberation room?"

The court responded that a juror should not evaluate the case at home and that neither a computer nor printer would be provided in the jury room. The court encouraged the jurors to discuss the evidence together and to use a board in the jury room for outlining their points. The court explained: "This is a different process than maybe what you do when you're at work or if you're at school . . . . This is a deliberative process. Part of what the benefit of the jury is . . . you have 12 people sharing their ideas about . . . the evidence they heard and how the law would apply to the evidence. . . . [¶] [I]f we could put all the facts in a computer and deliver an answer, we wouldn't need a jury. But that's not the process we engage in here. This is a process of . . . give and take where people

talk to each other. They don't forego their opinions about the evidence but they listen to other people's opinions and they evaluate things in that fashion. [¶] . . . [I]t's different than a purely quantitative evaluation of everything. People are human beings. The jury is 12 human beings, thinking and talking about the evidence together. It's not such a mathematical process."

Following the court's explanation and the playing of the audiotape evidence, the jury resumed deliberations for only a few minutes before presenting another note. The note, written at Juror No. 9's request, asked for a definition of the word "abiding" and asked "is it possible for someone to come or stay to review the evidence on their own" apart from the other jurors. The court responded that individual review of the evidence when the jury was not assembled was not possible, and that no further definition of "abiding" would be provided apart from the instructions previously given. The jury then resumed deliberations for about two hours before the end of the day.

The next morning, Thursday March 17, the jury foreperson sent a note to the court asking if the jurors could have extra copies of the instructions and take the instructions home. The foreperson also stated that "[o]ne juror is not comfortable with [the] process[,] causing others to feel they cannot proceed" and asked "[w]hat is the process of using an alternate when a juror is causing conflict with [the] group?" The court provided each juror with a copy of the instructions, to be kept at court, and questioned the foreperson about the concerns expressed in the note concerning the deliberative process. The foreperson said a "particular juror," later identified as Juror No. 9, had questions about many words in the jury instructions and was "not open to discussion of the words or the definitions" but wants "to have formalized questions continuously submitted to the court" for further definition rather than looking "inside the instructions for definitions" or using "the common definition" of the word. The foreperson reported that Juror No. 9 was not comfortable with the jury instructions, "the process of coming to a conclusion, of analyzing circumstantial versus direct evidence" and that, as a result, other jurors felt that deliberations were not "a working process" and were experiencing "spiked emotions." Out of the jury's presence, the court expressed to counsel its concern that Juror No. 9 was

not "understanding the law." The court recalled the foreperson and asked him if "the dynamics of the deliberations" might change if additional words were defined or if the jury was advised by the court that certain words could not be further defined. The foreperson said it was possible but explained that Juror No. 9 was rereading "every single instruction" and struggling over many terms, including the meaning of "intent." The court remarked privately to counsel that it questioned if one is capable of serving on a jury if one "can't understand and apply the term 'intent.' "

The court, with counsels' consent, questioned Juror No. 9 to see if he was capable of proceeding. The court cautioned the juror not to disclose the substance of the deliberations and focused on whether the jury had everything it needed to deliberate. The court noted that the jurors had been given all trial exhibits for review and individual copies of the jury instructions and asked Juror No. 9 if he had "everything you need to deliberate" and discuss the charges with the other jurors. Juror No. 9 said he was "not at that stage yet." The juror said he was not ready to deliberate because he needed more time to study his notes and the jury instructions. The court asked Juror No. 9 if he would be ready to deliberate after further review of the jury instructions and he said "probably." The court asked if there were any words in the jury instruction that the juror felt were not sufficiently defined, and the juror said the problem with relying on the plain meaning of English words was that "everybody may not have the same understanding of the English words or interpretation" and "different people have different perceptions." The court said "that's part of the jury process," and Juror No. 9 said "it's not right, because the instruction about the law should come from the court" and wanted the jury to submit questions to the court when there were differing interpretations. The court asked if Juror No. 9 had been the one to request to stay late to review the evidence and he said that he had because he "was slow in reading English." Juror No. 9 was born abroad but had lived in the United States for "many years" and had a Ph.D. degree in physical chemistry from an American university. He said he had "taken a criminal law class" and had heard the terms contained in the jury instructions but found it "complicated" and wondered "for people who did not take such a class, how can they possibly understand instructions so

quickly?" As an accommodation, the court offered to send the rest of the jurors home early and let Juror No. 9 stay to review his notes and the jury instructions that day and the following days when the jury was not scheduled to deliberate. Juror No. 9 accepted and said he "believed" he would be prepared to deliberate after doing so. The juror spent nine hours over several days alone in the jury room reviewing his notes and the jury instructions.

Deliberations resumed on the afternoon of Monday March 21and continued through Wednesday March 23. On the morning of March 24, the foreperson sent a note to the court stating, "We the jury have not been able to reach a unanimous consensus on any of the charges at this time. [¶] It is the opinion of several jurors that one juror is having challenges with the concepts of 'reasonable.' One juror, in particular, continues to discuss ideas from his personal experiences that were not presented in this case as evidence nor are they relevant to the case before us. [¶] This has caused conflict within the group of jurors and elevated tempers to the point that the group will not be able to reach agreement on the charges before us. [¶] At this time we would either require an alternate juror or move towards a hung jury verdict."

Juror No. 9 wrote a reply note saying he disagreed with the foreperson's statement and thought deliberations should continue. Juror No. 9 said "[t]he jury instruction calls for us to rely on common sense and experience. Relying in part on my experience in life, I feel that on the basis of the evidence as presented . . . I do not believe that the prosecution has sufficiently proven the allegations to allow me to form an abiding conviction about the guilt alleged."

The court called the jury into the courtroom. The court first addressed the foreperson's note about the inability to reach consensus. The foreperson said the jury had discussions and preliminary votes on six of the seven charges and had cast ballots on a couple charges. The vote on the last ballot was 11 to 1. The court asked the foreperson, then Juror No. 9, if there was any legal clarification the court could provide to assist the jury in reaching a verdict. Juror No. 9 said "I don't know what to ask for except for understanding of the Constitution or the jury instruction, because people have different

interpretations." The court asked if he had a specific question and, after further exchange, Juror No. 9 noted that the juror questionnaire said a juror "must follow the law regardless whether you believe in it or not. And, I mean, at that time I hesitated and but then I – there is something I don't agree with, I mean, then why does [the] Constitution require us to follow something we don't believe in? [¶] So this may be a question in everybody's mind, and it's so – so why is the standard set so high that defendant is – should be presumed innocent? And why can't we apply the lower standard of proof such as preponderance of the evidence?" The court asked Juror No. 9 to write a note with his legal questions so court and counsel could confer about a possible response, and declared a long lunch recess.

Juror No. 9 wrote five pages of questions. The numerous questions included the following: "Why is there a difference in the standard of proof between civil trials and criminal law?"; "Does it make sense that a defendant may be found not guilty in a criminal trial, but guilty in a civil trial (based on the same facts)?"; When I have reasonable doubt, how do I tell that my doubt has risen only to the level of preponderance of the evidence, but has not reached the level of beyond a reasonable doubt (for sure ?)"; "Why must we pledge that we must follow the law even when the law is itself in dispute in court?"; "Why must a defendant be presumed innocent?"; "Why is defense not required to present any evidence, or to call any witness?"; "Does the fact that an evidence has been admitted by the court into evidence mean that the court has determined that the evidence is reliable?"; "When a witness gives contradictory testimony, I am at a loss as to how to determine, objectively, which testimony I should believe"; "What constitutes juror misconduct requiring disqualification, mistrial, or new trial?"; "What if a juror suddenly realizes that the juror can no longer be impartial?"

The court conferred with counsel. The prosecutor questioned the juror's "readiness" to serve as a juror and said Juror No. 9's note posed many questions that were of "a broad ranging nature" "far beyond the purview of a juror." Defense counsel objected to removing Juror No. 9 from the jury but said the court should not "endeavor to answer the questions" because the "contents of the questions divulge" the "deliberative

process of the jury." The court expressed doubts that Juror No. 9 was following the law and decided to examine him further.

Juror No. 9 said that some of the questions he posed referred to other jurors, not himself, including the question asking what happens if a juror "can no longer be impartial." Outside of the jurors' presence, defense counsel argued that Juror No. 9's note was "essentially describing the deliberative process" and that no further inquiry or action was necessary. The prosecutor disagreed, arguing that the juror's written questions went "far beyond what was put to him by the court this morning" and demonstrate that Juror No. 9's mind was ranging beyond "the issues placed before the jury in this trial."

The court concluded that Juror No. 9 was not following the law. The court found that Juror No. 9 was "considering things that he's been told not to consider," asking, for example, why the defense is not required to present any evidence or call any witnesses. The court observed that, from the outset of trial, "the court has admonished the jurors that that's the constitutional protection that the defendant is entitled to, and the fact that he's raising that after four days of deliberation indicates to the court that he's not following the law." The court also noted that Juror No. 9 questioned why a defendant is presumed innocent, despite clear instructions to that effect, and is "considering why there's a different standard of proof in civil versus criminal" trials. The court said Juror No. 9 was not "following the law that the court has instructed him on or following the court's directions as to what he's supposed to deal with here. . . . [¶] . . . [H]e's clearly getting way beyond the scope" and "engages in flights of legal fancy," "speculating on things that are far beyond the record." The court also noted that Juror No. 9 expressed an inability to judge credibility in writing in his note that he was "at a loss as to how to determine" which testimony to believe. The court found Juror No. 9 "incapable of executing his obligations as a juror in a fair and impartial manner," removed him from the jury and seated an alternate juror in his place.

Jury deliberations began anew on the afternoon of Thursday March 24. The jury deliberated for the rest of that day and recessed until Monday, March 28. The jury

reached a verdict on the afternoon of March 28. The jury found defendant guilty of five counts and not guilty of two counts.

B. *The court did not abuse its discretion.*

" 'The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. (§ 1089.) "When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*. [Citations.]" [Citation.] . . . "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 898.)

"Great caution is required in deciding to excuse a sitting juror" (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71) especially where, as here, a lone holdout juror is excused.[7] "A court's intervention may upset the delicate balance of deliberations. The requirement of a unanimous criminal verdict is an important safeguard, long recognized in American jurisprudence. This safeguard rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case. The fact that other jurors may disagree with a panel member's conclusions, or find disagreement frustrating, does not necessarily establish misconduct." (*Ibid.*) But removal of a holdout juror is proper where the facts demonstrate the juror is unable to follow the law. (*People v. Alexander* (2010) 49 Cal.4th 846, 928.) A "trial court's attempt to ensure the jurors understood the law," and removal of a holdout juror who would not or could not follow the law, "cannot be viewed as an improper attempt to overcome a deadlock in the jury's deliberations." (*Ibid.*)

[7] Despite the court's admonitions not to disclose his deliberative process, Juror No. 9 revealed in a note to the court that he did not believe "that the prosecution has sufficiently proven the allegations to allow me to form an abiding conviction about the guilt alleged." The court later learned that the numerical division of the deadlocked jury was 11 to 1. Contrary to defendant's claim, the court did not err by inquiring into the jury's numerical division. (*People v. Homick, supra,* 55 Cal.4th at p. 901.)

"While removal of a juror is committed to the discretion of the trial court, upon review, the juror's disqualification must appear on the record as a demonstrable reality. 'The demonstrable reality test entails a more comprehensive and less deferential review' than substantial evidence review. 'It requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias [or other good cause for removal] was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' " (*People v. Homick, supra,* 55 Cal.4th at p. 899.)

The trial court's conclusion that Juror No. 9 was not following the law is well supported by the record set out in detail above. Defendant argues that Juror No. 9 "was very conscientious and hardworking." That appears to be true, but despite his best efforts, the juror manifestly was unable to focus on the relevant principles and to apply the court's instructions to the facts of the case before him. The juror appears to have been overwhelmed by the task of a juror, questioning the basic principles he was instructed to accept, such as the presumption of innocence, and the meaning of many commonly used words in the court's instructions. It is true, as defendant points out, that Juror No. 9 told the court that some of the questions he posed were "raised by the other jurors," but there is no other indication that any other juror was having any difficulty in understanding or following the court's instructions. In all events, most of the questions posed by Juror No. 9 clearly related his own deep uncertainties and inability to follow the court's instructions. He asked, "When I have reasonable doubt, how do I tell that my doubt has risen only to the level of preponderance of the evidence, but has not reached the level of beyond a reasonable doubt (for sure?)" He acknowledged, "When a witness gives contradictory testimony, I am at a loss as to how to determine, objectively, which testimony I should believe."

Juror No. 9's questions went far beyond issues relevant to the case. He asked: "Why must we pledge that we must follow the law even when the law is itself in dispute

in court," which he explained referred to conflicts between federal and state courts. The juror was unable to concentrate his attention on relevant legal matters despite accommodations and assistance by the trial court, including hours of independent study of jury instructions and trial notes. The trial court rightly concluded that Juror No. 9 went "way beyond the scope" of the trial as he "speculat[ed] on things that are far beyond the record" and was unable to follow the law applicable to the case.

Defendant argues that the trial court erred in limiting its investigation to Juror No. 9 without inquiring into possible misconduct by other jurors. Defendant contends that evidence of misconduct was embedded in Juror No. 9's five pages of questions, and in the question "What if a juror suddenly realizes that the juror can no longer be impartial?" which he said referred to "other persons." As our high court has observed, "A trial court made aware of the possibility of a juror's misconduct, and particularly possible misconduct occurring during the jury's deliberations, is placed on a course that is fraught with the risk of reversible error at each fork in the road. [Citations.] The court must first decide whether the information before the court warrants any investigation into the matter. [Citation.] If some inquiry is called for, the trial court must take care not to conduct an investigation that is too cursory [citation], but the court also must not intrude too deeply into the jury's deliberative process in order to avoid invading the sanctity of the deliberations or creating a coercive effect on those deliberations [citation]. After having completed an adequate (but not overly invasive) inquiry into the misconduct issue, the trial court must then decide whether, under section 1089, there is 'good cause' to excuse the juror at issue. The court at this final fork might err in declining to dismiss a juror who should have been excused [citation] or excusing a juror who should have been retained [citation]. In making these decisions, a trial court might at times be placed between a rock and a hard place." (*People v. Fuiava* (2012) 53 Cal.4th 622, 710-711, fn. omitted.)

The trial court here navigated this difficult course well and did not abuse its discretion by limiting its investigation to Juror No. 9. The information provided by Juror No. 9 did not warrant inquiry into the conduct of the other jurors. His general question

about juror impartiality indicated, at most, that he believed other jurors were not impartial. Such feelings are not uncommon during heated deliberations and here the juror provided no reason to believe other jurors were not impartial. The expression of such a sentiment without any evidence of juror bias does not compel further investigation. Nor was investigation of other jurors compelled by the suggestion that evidentiary issues like the reliability of admitted evidence and the burden of proof were "raised" during discussions among the jurors. These matters were proper subjects of jury deliberation. There is no evidence that the other jurors were not following the law on these subjects. The court acted properly here in limiting the scope of its inquiry and not delving into the content of the jury's deliberations. A trial court must take care "to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*People v. Thompson* (2010) 49 Cal.4th 79, 137.)

3. Expert testimony based on a hypothetical question was properly admitted and in all events was not prejudicial.[*]

The victim testified that the rapist used a plastic bag as a condom and a bag recovered from the crime scene was examined and found to contain semen matching defendant's DNA. There was also a mixture of the victim's epithelial cells and her husband's sperm cells on the exterior surface of the bag. A criminalist with expertise in DNA analysis was asked by the prosecutor: "Hypothetically, if a sperm sample is recovered from a surface that had been put inside a female vagina, in your experience, can that surface receive a transfer of preexisting sperm from within the vagina?" The witness answered "yes." Defendant objected to the question as an improper hypothetical question. Defendant contends the expert's opinion was based on a factual assumption without evidentiary support because there was no evidence of recent sexual relations between the victim and her husband, and a vaginal swab taken when the rape was reported found no sperm.

[*] Part 3 is not certified for publication. (See fn., *ante,* p. 1.)

" ' "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citation.]" It is true that "it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.] On the other hand, the expert's opinion may not be based '*on assumptions of fact without evidentiary support* [citation]*, or on speculative or conjectural factors*. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" ' " (*People v. Moore* (2011) 51 Cal.4th 386, 405.) "[A] ruling on admissibility of such evidence under Evidence Code section 352 is reviewed under an abuse of discretion standard." (*Id.* at p. 406.)

The hypothetical question here assumed facts within the limits of the evidence. There was testimony that sperm from the victim's husband was found on the plastic bag retrieved at the crime scene. It was not necessary for the victim to testify to recent sexual relations with her husband to establish sufficient foundation for the hypothetical question. Nor did the absence of sperm on the vaginal swab taken hours after the rape preclude the possibility that sperm existed in the victim's vagina at the time of the rape. The expert's testimony did no more than establish the possibility of transferring semen from previous sexual activity to the exterior surface of the plastic bag used as a condom.

In any event, admission of the expert's testimony, even if without proper foundation, was not prejudicial. It is not reasonably probable that the jury would have reached a different verdict absent the admission of the expert's answer about the possible transfer of sperm to the exterior surface of the plastic bag. (See *People v. Moore, supra,* 51 Cal.4th at p. 406 [applying reversible error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].) The jurors were instructed that they may disregard any opinion

"unsupported by the evidence" and further instructed that "[a] hypothetical question asks the expert to assume certain facts are to be true and then to give an opinion based on the assumed facts. [¶] It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion." Defense counsel argued strenuously that the facts assumed in the hypothetical question were unproven because no sperm was found in the victim's vagina at the time of the sexual assault examination. The jury was thus fully aware of the need to consider the truth of the facts assumed in the hypothetical before crediting the expert's opinion. The absence of prejudice is also established by the strong evidence of defendant's guilt independent of the challenged testimony. Defendant's fingerprints were found in the victim's kitchen and personal property stolen from the victim's home was recovered at what appeared to be defendant's residence. Most importantly, whatever the significance of the presence of semen from the victim's husband, the defendant's semen was found in the plastic bag. Acquittal on the rape charge was not reasonably probable had the expert's testimony been excluded.

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

_____
Jenkins, J.

Superior Court of Alameda County, No.H46973, Honorable Michael J. Gaffey, Judge.

COUNSEL

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Sharon Wooden and Catherine McBrien, Deputy Attorneys General, for Plaintiff and Respondent.

Barry M. Karl, under appointment by the Court of Appeal for Defendant and Appellant.

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